IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

WEDNESDAY, THE 1ST AUGUST 2007 / 10TH SRAVANA 1929

CRL.A.No. 330 of 2002(C)

SC.312/2001 of ADDL. SESSIONS COURT (ADHOC), THRISSUR
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APPELLANT: ACCUSED
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1. **VISWANATHAN, S/O. ACHUTHAN, KANDARATHY HOUSE, KADANGODU VILLAGE, PARAPPURAM DESOM.**

2. **ANIL, S/O. NEELI, THERENDIYIL HOUSE, KADANGODU VILLAGE, PARAPPURAM DESOM.**

3. **BABU S/O. CHANDRAN, PARATHAKULAM HOUSE, KADANGODU VILLAGE, PARAPPURAM DESOM.**

4. **DAMODARAN, S/O. KUTTAPPU, KANDIRANGATH HOUSE, KADANGODU VILLAGE, PARAPPURAM DESOM.**

BY ADV. SRI.THOMAS M.JACOB
SRI.G.RAJAGOPAL

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20/07/2007, THE COURT ON 01.08.2007 DELIVERED THE FOLLOWING:

CRL.A. NO.330/2002

ORDER ON CRL.MP. 3020/2002 IN CRL.A. 330/2002

DISMISSED

01.08.2007 **SD/- K.R.UDAYABHANU, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

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K.R. UDAYABHANU, J.

CRL.A.NO. 330 OF2002

DATED THIS THE 1st August 2007

JUDGMENT

The appellants are the accused in S.C.No.312/2001 who stands charge sheeted for the offence under Section 55(a), (b) and (g) of the Abkari Act and convicted for the above offences and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- (Rupees one lakh) and in default to undergo simple imprisonment for six months each for each of the offences.

2. The prosecution case is that on 2-9-1998 at about 10.15 p.m. at Chola quarry at Katyathottu village in furtherance of the common intention was found to manufacture illicit liquor. The evidence adduced in the matter consisted of the testimony of PWs.1 to 4 and Exts.P1 to P6 and MOs.1 to 11.

3. It is the defence version that they were nowhere near the scene of occurrence and that they were sitting in a tea shop and that they were coerced to provide the information as to the

persons who owned article of distillation found near the quarry as they were unable to provide the same, the police foisted a false case on them. PW1 is the the Sub Inspector of the local police station who allegedly detected the offence. PW2, the alleged independent witness did not support the prosecution. Further more he is the younger brother of A1. PW3 is the Sub Inspector who was along with PW1 at the time of detection. PW4 is the A.S.I. who investigated the case as well as prepared the scene mahazar.

4. As per Ext.P1 seizure mahazar allegedly prepared at the spot as testified to by PWs.1 and 3, the Sub Inspector and the police constable concerned, about 20 litres of wash found in an aluminium pot and the illicit liquor found in a plastic container and the two aluminium pots, a mud pot with tube fixed, a kerosene lamp, one mug and a beer bottle and glass bottles were seized from the scene of occurrence. After taking the sample in three bottles of 375 ml. each of the wash and three bottles of 375 ml. each of the illicit liquor, the rest was

destroyed at the spot. The court below discarded the contentions of the accused that the absence of two independent witnesses rendered the seizure invalid and that Section 36 of the Abkari Act in this regard has not been complied with and also the contention that MO.11 the plastic can was found perforated and hence the alleged recovery cannot be said to have been proved and there was delay in producing the MOs. before the court.

5. Counsel for the appellants has stressed the fact that there was a long delay in producing even the sample before the court. It is pointed out that the date of incident is at 2-9-1998 and that Ext.P3 property list has been produced before the court only on 10-9-1998. As per the endorsement in the list in Ext.P3 on 10-9-1998, the contraband etc. were not produced and the property list was returned. It was only on 18-9-1998, i.e. after about 17 days even the sample was produced before the court. The prosecution has not explained the delay. It is also pointed out that there was further delay in submitting the forwarding note and also in conducting the chemical analysis of the sample.

The counsel has also stressed that despite the fact that there are a number of houses near the scene of occurrence as per Ext.P8 scene mahazar, the Detecting team could only make PW2 the brother of A1 as witnessed to the incident. Hence, in the absence of at least two independent witnesses, the recovery cannot be said to have been proved. It is further pointed out that the absence of witnesses assumed significance in view of the fact that PW1, the detecting officer proceeded to the spot after getting prior intimation. It is also pointed out that the seizure made is not explained in Ext.P1 mahazar except mentioning that sampling was done and the sample bottles were sealed. There is nothing to identify the bottles either with reference to the seal affixed or with respect to any other identification marks like the label affixed containing the signature of the accused or the witnesses. The statement that the balance wash and liquor was destroyed at the spot is an incredible explanation for non-production of the contraband before the court. It is pointed out that there was no necessity to destroy the balance liquor even if

it is conceded that it was difficult to carry the balance wash. The counsel has also relied on the decision reported in **Narayani v. Excise Inspector, 2002(3)K.L.T.725** that in the absence of proof as to the safe keeping of the sample in proper custody, tampering cannot be ruled out. He has also relied on the decision in **State of M.P.** v. **Ramprakash, 1989 Crl.L.J.1585** that two independent and respectable witnesses in the locality is mandatory in order to comply with Section 100(4) Cr.P.C. He has also relied on the decision in **Sate of H.P. v. Sudarshan Kumar, 1989 Cri.L.J.1412** in support of the contentions that two independent witnesses are mandatory and that the contraband ought to have been produced before the court immediately.

6. I find that the contention that Section 36 of the Abkari Act has not been complied with and that Section 100(4) Cr.P.C. has also not been observed is not at all appealing as the contingency envisaged therein are with reference to search and seizure. In the instant case, the articles were found in an open

place and that too at the time when the officials were on patrol duty. Hence, I find that the above contentions are only to be rejected.

7. I find that the delay of 17 days in producing the sample and the incriminating articles of distillation before the court is relevant especially as the investigating officer has not provided any explanation for the delay. Further more, there is no evidence as to the proper custody of the articles at the police station.(**Narayani v. Excise Inspector, 2002(3)K.L.T. 725**). Moreover, there is nothing mentioned in the mahazar as to the manner in which the sampling and sealing was done at the spot. The above aspects appears further more glaring in view of the fact that there are no independent witnesses to the seizure and sampling. The fact that the brother of A1 is cited as the independent witness also appears somewhat odd. There is no explanation for destroying the balance quantity of illicit liquor. I find that the above circumstances entitle the accused for benefit of doubt. I find that the prosecution has not established beyond

reasonable doubt that the accused is guilty of the offences alleged.

In the result the conviction and sentence is set aside. The accused are acquitted. The appeal is allowed.

K.R.UDAYABHANU, JUDGE

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K.R.UDAYABHANU, J

CRL.A. 330 of 2002-A
JUDGMENT

27-6-2007

K.R. UDAYABHANU, J.

CRL.A.NO. OF

DATED THIS THE th June 2007

ORDER

K.R.UDAYABHANU, JUDGE

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